



COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-6

November 04, 2013

Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252

HEARING OFFICER RULING VERIZON MA MOTION FOR ABEYANCE

I. INTRODUCTION

The Department of Telecommunications and Cable ("Department") denies the motion of Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") to hold this proceeding in abeyance pending the execution of an agreement containing the final terms and conditions governing its exchange of voice traffic in Internet Protocol ("IP") format. The Department is not persuaded that the circumstances presented warrant abeyance of the proceeding. Regulatory review of the agreement under which Verizon MA has publicly stated it is exchanging voice traffic in IP format is not premature. Nothing presented by the parties suggests that it would be inefficient or onerous to discover through the evidentiary process the terms and structure of the final agreement in a manner sufficient for the Department to conclude whether the final agreement will constitute an interconnection agreement subject to 47 U.S.C. §§ 251 and 252. The Department directs the parties to meet and confer and submit a procedural schedule.

II. BACKGROUND

On May 13, 2013, the Department opened an investigation upon its own motion, to determine whether an agreement entered into by Verizon MA and providing for the exchange of Voice over Internet Protocol (“VoIP”) traffic in IP format (“IP Agreement”) is an “Interconnection Agreement” as contemplated under 47 U.S.C. § 251. *Investigation by the Dep’t of Telecomms. & Cable on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Mass. is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Dep’t for Approval in Accordance with 47 U.S.C. § 252, D.T.C. 13-6, Order Opening an Investigation, Declining to Issue an Advisory Ruling, and Denying Verizon MA’s Motion to Dismiss or Stay the Proceeding* (May 13, 2013) (“*Order Opening Investigation*”). This proceeding is docketed as D.T.C. 13-6, and is a formal adjudicatory proceeding conducted under G. L. c. 30A and 220 C.M.R. § 1.00 *et seq.* of the Department’s Rules of Practice and Procedure.

On June 25, 2013, Verizon MA submitted its *Motion for Abeyance* (“Verizon MA Motion”) requesting the Department hold this proceeding in abeyance while the parties to the agreement finalize and “memorialize in writing the terms and conditions governing their exchange of voice traffic in IP format.” Verizon MA Motion at 1. Verizon MA asserts that the Department should grant the abeyance in the interest of efficiency, claiming it would be impractical and wasteful for the Department to move forward while the parties are negotiating a written agreement. Verizon MA Motion at 1. Verizon MA further asserts that there is no agreement in a form reviewable by the Department; any work accomplished in discovery to identify the non-written terms would be moot once a final agreement is in place; the parties are moving forward with the process with a draft agreement under consideration; and the rights of

any intervenors would not be prejudiced, as parties are not restricted from opening negotiations with Verizon MA to enter into agreements to exchange VoIP traffic in IP format. *Id.* at 2-3.

The Department set August 30, 2013 as the deadline for parties' responses to Verizon MA's Motion. *See* July 31, 2013 Email of Department Telecommunications Specialist Michael Scott to the Service List for D.T.C. 13-6. On August 30, 2013, Comcast Phone of Massachusetts, Inc. ("Comcast") submitted to the Department, *Comments of Comcast Phone of Massachusetts, Inc. in Support of Verizon's Motion for Abeyance* ("Comcast Comments"). Comcast agrees with Verizon MA's view that it would be impractical and wasteful for the Department to move forward prior to the parties entering into a final agreement. Comcast Comments at 1. Comcast asserts and supports the general contention that regulatory review is premature prior to the parties finalizing an agreement and that the investigation should not be addressed in a piecemeal fashion. *Id.* at 2-3.

Also on August 30, 2013, CTC Communications Corp., d/b/a EarthLink Business; Lightship Telecom, LLC, d/b/a EarthLink Business; Choice One Communications of Massachusetts, Inc., d/b/a EarthLink Business; Conversent Communications of Massachusetts, Inc., d/b/a EarthLink Business; EarthLink Business, LLC (formerly New Edge Network, Inc., d/b/a EarthLink Business); Cbeyond Communications, LLC; tw data services llc; and Level 3 Communications, LLC (collectively, the "Competitive Carriers") submitted to the Department their *Competitive Carriers Opposition to Verizon's Motion for Abeyance* ("Competitive Carriers Opposition"). The Competitive Carriers assert that the IP Agreement is reviewable in its current form, it would not be an inefficient use of resources to move forward with the proceeding, and any Department ruling would be consistent with the type of guidance the FCC encourages states to provide. Competitive Carriers' Opposition at 2-3. The Competitive Carriers also assert that a

comparative examination of the IP Agreement contains similarities with interconnection agreements the Department has previously reviewed. *Id.* at 6-7. Lastly, a stay would prejudice the rights of intervenors, impeded competition, and further delay the transition to all-IP networks. *Id.* at 12-13.

Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel Communications of the Mid-Atlantic, Inc., and Virgin Mobile USA, L.P. (collectively “Sprint”) also submitted to the Department an *Opposition to Motion for Abeyance* (“Sprint Opposition”), on August 30, 2013. According to Sprint, that Verizon MA acknowledges that an agreement exists is sufficient for the Department to move forward with this proceeding. *Id.* at 5. Further, Sprint asserts that Verizon MA and Comcast must have reached sufficient agreement on business and operational terms as the parties are exchanging traffic and that their failure to memorialize those terms does not mean they are in a form that cannot be reviewed by the Department, citing instances where state agencies have found oral agreements to constitute interconnection agreements. *Id.* at 4-5. In addition, Sprint asserts parties may be prejudiced by an abeyance because if the Department finds the agreement to be an interconnection agreement under 47 U.S.C. § 251, intervenors would have been able to enter into interconnection agreements under the terms of the agreement. *Id.* at 7. Finally, Sprint believes that regardless of its final determination, the Department may still provide valuable guidance concerning the applicability of 47 U.S.C. § 251 to agreements for the exchange of VoIP traffic over an IP network. *Id.* at 8.

On September 11, 2013, Verizon MA submitted to the Department, *Motion of Verizon MA for Leave to File Reply* (“Verizon MA Motion for Leave”) and *Reply of Verizon MA in Support of Motion for Abeyance* (“Verizon MA Reply”). Verizon MA in reply asserts claims that the business and operational terms are relevant for determining whether the IP Agreement is

subject to 47 U.S.C. § 251, warranting an abeyance. Verizon MA Reply at 3. Verizon MA also reiterates its point that while the terms of the IP Agreement could be identified, the effort would require substantial resources and mooted once the parties execute a final agreement. *Id.* at 4.

III. ANALYSIS AND FINDINGS

A. The Department Grants Verizon MA Leave to File a Reply.

As an initial matter, the Department grants Verizon MA's Motion for Leave and accepts Verizon MA's Reply into the record. Verizon MA claims that its "Reply will not burden the forward progress of this case and may assist the Department in addressing arguments made by the CLECs in opposition to the motion for abeyance." Verizon MA Motion for Leave at 1. The Department's procedural regulations allow a party to seek leave to file a motion (220 C.M.R. 1.04(5)) and it is within the Department's discretion whether to accept such motions (200 C.M.R. 1.06 (6)). Verizon MA's Motion for Leave to File Reply is uncontested. While the Department has discretion in granting motions for leave to file reply, the Department will typically balance the potential for additional insight against the need for conducting an efficient hearing. *See, e.g., Investigation by the Dep't of Telecomms. & Energy on its own motion as to the propriety of the rates and charges set forth in the following tariff: M.D.T.E. No. 14, filed with the Dep't on June 16, 2006, to become effective July 16, 2006, by Verizon New England Inc. d/b/a Verizon Mass., D.T.C. 06-61, Order on Clarification & Partial Reconsideration* at 7 (May 11, 2012). The Department is persuaded that Verizon MA's Reply may provide some additional insight and would not burden the progress of the hearing. Accordingly, the Department grants Verizon MA's Motion for Leave. 220 C.M.R. 1.06(6).

B. Verizon MA's Motion for Abeyance is Procedurally Appropriate.

The Competitive Carriers assert that as a matter of procedure and administrative efficiency, the Department should deny Verizon MA's Motion for Abeyance. Competitive Carriers' Opposition at 5-6. Specifically, the Competitive Carriers claim the Department has previously considered and denied a motion to dismiss or stay the proceeding from Verizon MA and the Department should not condone piecemeal tactics of delay. *Id.* Verizon MA does not respond to the Competitive Carriers' argument in its reply, *see* Verizon MA Reply at 1-4, nor did it need to. Although it denies Verizon MA's motion for other reasons, the Department does not find that the motion was procedurally improper.

The Department's procedural regulations allow a party to seek leave to file a motion (220 C.M.R. 1.04(5)) and it is within the Department's discretion whether to accept such motions (200 C.M.R. 1.06 (6)). The Department agrees with the Competitive Carriers that considerations of efficiency may warrant denying motions for abeyance, where the matters raised in the motion may have been appropriate in a previously submitted motion seeking stay or abeyance. However, the Department is not persuaded that Verizon MA should have raised the matters within the pending motion for abeyance to the Department in its motion to dismiss or stay the proceeding filed in Docket No. D.T.C. 13-2. While the Department did not wipe the slate clean in closing Docket No. D.T.C. 13-2 and opening Docket No. D.T.C. 13-6, there are sufficient procedural and substantive differences between the two proceedings that make Verizon MA's Motion for Abeyance appropriate.

C. The Department Denies Verizon MA's Motion for Abeyance.

Since Verizon MA has not established that circumstances exist here to warrant postponement of this proceeding, the Department denies the Motion for Abeyance. The

Department may hold a proceeding in abeyance where moving forward with a proceeding is an inefficient use of the Department's and parties' resources. *See Pet. for Arbitration of an Interconnection Agreement between Intrado Commc'ns Inc. and Verizon New England Inc. d/b/a Verizon Mass.*, D.T.C. 08-9, *Arbitration Order* at 10 (May 8, 2009); *Proceeding by the Dep't of Telecomms. & Energy on Its Own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60 Track A & Track B, *Interlocutory Order on Motion to Stay of Verizon New England, Inc. d/b/a Verizon Mass.*, at 16-17 (Apr. 2, 2004); *Investigation by the Dep't of Telecomms. & Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, & the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Mass.' Resale Servs. in the Commw. of Mass.*, D.T.E. 01-20, *Interlocutory Order on Part B Motions* at 8 (Apr. 4, 2001); *see also Pet. of Safari Commc'ns, Inc. for Designation as an Eligible Telecomms. Carrier on a Wireless Basis*, D.T.C. 11-4, *Order of Dismissal without Prejudice* (May 1, 2012) (dismissing a petition in light of FCC order reforming the eligible telecommunications carrier designation process requiring FCC approval of a compliance plan before refiling). The Department has also held a proceeding in abeyance pending the outcome of FCC proceedings when it would be unreasonably onerous for the Department to issue a decision without preceding action by the FCC. *Investigation by the Dep't of Telecomms. & Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Mass.' Resale Servs. in the Commw. of Mass.*, D.T.E. 01-20, *Interlocutory Order on Part B Motions*, at 8 (Apr. 4, 2001)

(staying a proceeding to review Verizon's proposed avoided cost study until the FCC promulgated new pricing rules for state commissions to follow); *see also Pet. of Safari Commc'ns, Inc. for Designation as an Eligible Telecomms. Carrier on a Wireless Basis*, D.T.C. 11-4, *Order of Dismissal without Prejudice* (May 1, 2012) (dismissing a petition in light of FCC order reforming the eligible telecommunications carrier designation process and requiring FCC approval of a compliance plan before refiling). For the reasons discussed below the Department is not persuaded that it is unreasonably onerous to issue a decision or inefficient to move forward with this proceeding pending the execution of the final terms and conditions of the IP Agreement.

Verizon MA entered into an agreement for the exchange of VoIP traffic over an IP network and is currently exchanging VoIP traffic under that agreement. *See* Verizon MA Motion at 1. Accepting, as Verizon MA asserts, that the agreement is preliminary and evolving does not negate the existence of the IP Agreement. Indeed, Verizon MA is exchanging traffic in accordance with the agreement, a fact that Verizon MA has repeatedly made public. *See* Verizon MA Motion at 1-3; CLEC Opposition at 2 n. 3. The publicly acknowledged existence of the agreement and the ongoing exchange of traffic also undermine Comcast's argument that regulatory review is premature here because the parties are still negotiating and the agreement is not yet finalized (Comcast Comments at 1-3 and cases cited). Regulatory review is not premature where, as here, the parties to an agreement are known, an agreement has been reached, and the end goals of the agreement are being achieved.

Further, the Department is not convinced that the use of the evidentiary process to identify the non-written business and operational terms under which Verizon MA is exchanging traffic would be onerous and inefficient. *See* Verizon MA Motion at 3. Verizon MA and

Comcast are sophisticated business entities and should be well aware of the terms under which they are currently exchanging traffic, even if those terms are not within an executed final agreement. As Verizon MA and Comcast are actively negotiating an agreement, they are likely tracking and maintaining the current business and operational terms under which they are exchanging traffic. In addition, Verizon MA has already sent a draft agreement to Comcast for consideration. Verizon MA Motion at 3. And Comcast has indicated the parties are in the process of memorializing terms for parts of their agreement. *See* Comcast Comments at 2-3. While the final agreement may not be agreed to yet, and Verizon MA and Comcast are still negotiating some terms in a piecemeal fashion, nothing presented by either party suggests that it would be inefficient or onerous to discover through the evidentiary process the terms and structure of the final agreement in a manner sufficient for the Department to conclude whether the final agreement will constitute an interconnection agreement subject to 47 U.S.C. §§ 251 and 252.

The Department is also not convinced that it is necessary to wait until Verizon MA and Comcast execute a written agreement with final business and operational terms, despite their potential relevancy to establishing the applicability of 47 U.S.C. §§ 251 and 252 to the IP Agreement. Verizon MA Reply at 3; Comcast Comments at 2-3. Again, while a final agreement may not yet be executed, the IP Agreement is an existing agreement under which Verizon MA and Comcast are exchanging traffic. The IP Agreement coupled with discovery concerning the ongoing negotiations and the draft agreement Verizon MA identified will likely identify all of the contractual elements, terms, and conditions that will form the parties' final agreement. Further, regardless, of the finality of the terms and conditions identified in the evidentiary process, Verizon MA may rely on them to present its argument that 47 U.S.C. §§ 251 and 252 do

not apply to the IP Agreement or the subsequent final agreement being negotiated between Verizon MA and Comcast.

D. This Ruling Does Not Address the Substantive Issue of Whether the IP Agreement is An Interconnection Agreement Subject to 47 U.S.C. §§ 251 and 252.

The Competitive Carriers and Sprint include in their oppositions lengthy discussion regarding whether the IP Agreement is an interconnection agreement subject to 47 U.S.C. §§ 251 and 252. Competitive Carriers Opposition at 5-9; Sprint Opposition 2-4. This analysis is premature. The Department does not make, nor is it able to make at this time, a determination concerning whether the IP Agreement is an interconnection agreement subject to 47 U.S.C. §§ 251 and 252. The purpose of this ruling is only to determine whether the Department should grant Verizon MA's Motion for Abeyance.

IV. PROCEDURAL SCHEDULE

The Department directs the parties to meet and confer and submit a proposed procedural schedule for this proceeding on or before November 22, 2013. The procedural schedule should identify the need for testimony, discovery, evidentiary hearings, oral arguments, and briefing and propose filing deadlines and hearing dates, as appropriate. It should also indicate whether the parties wish to hold a procedural conference, and what dates the parties are available for such a conference. To the extent, parties are unable to reach accord on a procedural schedule; the Department will accept competing proposals and will set a procedural conference. Such proposals must include an explanation of the differences between the proposals and why agreement could not be reached.

V. RULING

In accordance with the details above, the Department DENIES Verizon MA's motion for abeyance and DIRECTS the parties to meet and confer and submit a proposed procedural schedule for this proceeding on or before November 22, 2013.

/s/ Michael Scott

Michael Scott
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.